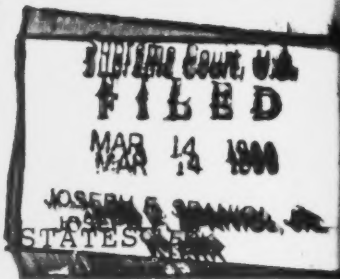


87-1688



No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

JOHN COMER OWEN

and BESSIE B. OWEN,

PETITIONERS,

CITY OF SPRINGFIELD, MISSOURI,

A MUNICIPAL CORPORATION,

RESPONDENT.

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI

JOHN G. NEWBERRY

Attorney of Record for Petitioners

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417-883-5535



**PETITION FOR A WRIT OF CERTIORARI**

**QUESTION PRESENTED FOR REVIEW**

Did the City of Springfield, Missouri, by condemning the fee in 1-1/2 acres of land out of a 109-acre tract owned by petitioners in order for the City to build a sewer lift station, thereby obtain the right to emit noises, odors and loud noises years later on the land retained by petitioners so as to make the condemnation judgment res judicata in a subsequent action by petitioners for damages against the City for causing such odors and noises.

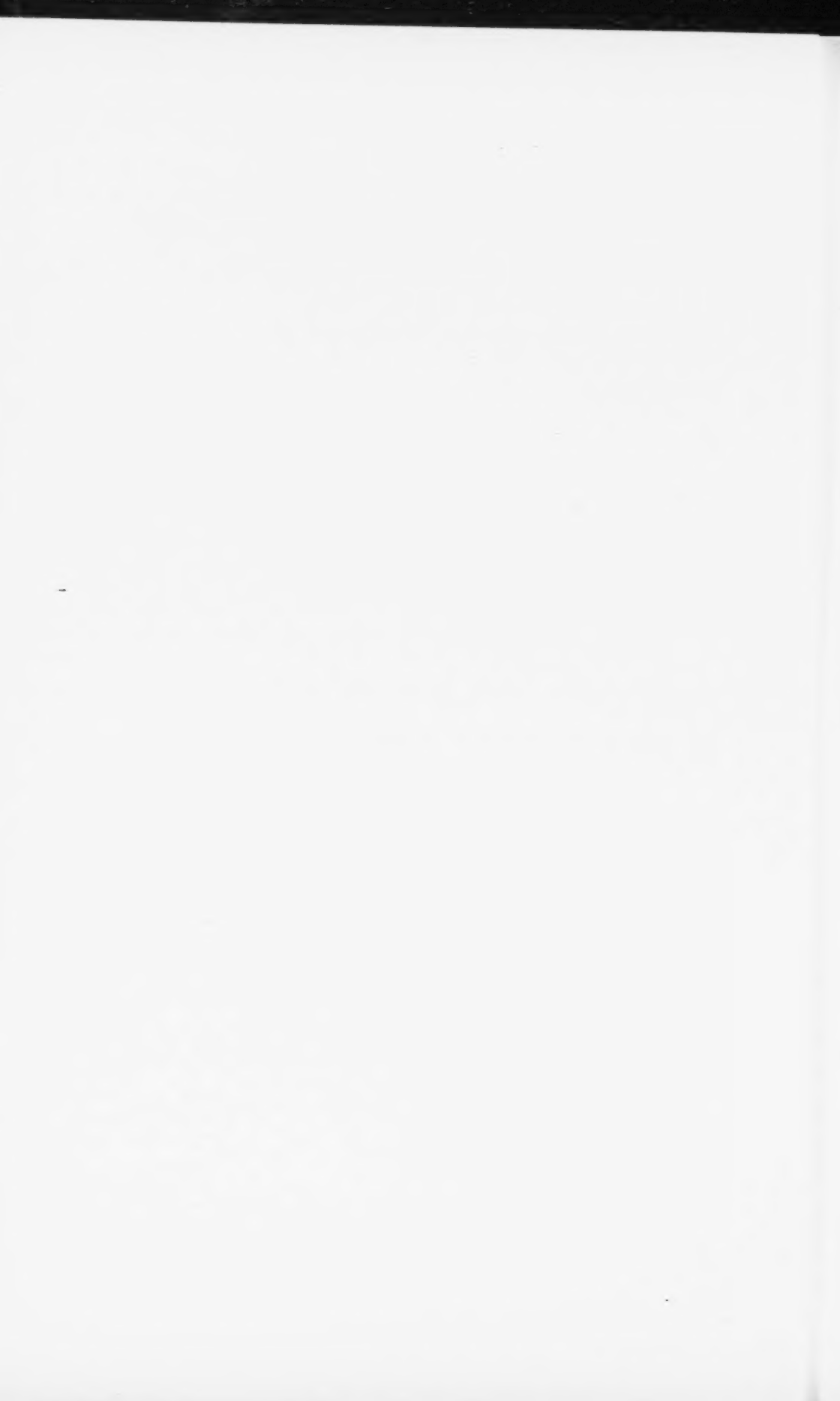


**LIST OF ALL PARTIES  
TO THE ACTION SOUGHT TO BE REVERSED**

John Comer Owen and Bessie B. Owen,  
Petitioners.

The City of Springfield, Missouri, a  
municipal corporation, Defendant.

- All defendants except the City of  
Springfield have been settled with and the  
matters on appeal dismissed or abandoned.



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**THE OFFICIAL AND UNOFFICIAL REPORTS OF THE  
CASE BELOW MAY BE FOUND AS FOLLOWS**

Owen vs. City of Springfield,

741 S.W.2d 16





## JURISDICTIONAL STATEMENT

- (i) The opinion of the Supreme Court of Missouri sought to be reviewed was handed down and entered on November 17, 1987.(1)
- (ii) The respondents, petitioners herein, filed their motion for a rehearing on December 2, 1987.(2)
- (iii) Motion of respondents, petitioners herein, for a rehearing was overruled on December 15, 1987.(3)
- (iv) 28 USCS Section 1257, Subsection 3, grants jurisdiction to this Court of this application for a writ of certiorari.

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(1) Appendix, Page A-80.

(2) Appendix, Page A-124.

(3) Appendix, Page A-137.



**CONSTITUTIONAL PROVISIONS  
INVOLVED IN THIS CASE**

Constitution Of The United States,  
Amendment V:

**AMENDMENT [V.]**

**Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived



of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution Of The United States,  
Amendment XIV:

**AMENDMENT [XIV.]**

**Section 1. Citizenship rights not to be abridged by states**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process



of law; nor deny to any person within its jurisdiction the equal protection of the laws.





## STATEMENT OF THE CASE

The City of Springfield, Missouri, planned to enlarge its sewer system to provide sewers to a large portion of its south and southwest sections in 1976 and 1977. The plan envisioned that large sewer mains would drain the area downgrade to a point outside the city on the James River. There the City would build a pump or lift station to pump the sewage back upgrade some 13,000 feet to its major sewage treatment plant.

The spot selected for its lift station was on 109 acres owned by petitioners. As a consequence, the City condemned approximately 1-1/2 acres of petitioners' land about 100 yards from their home.



The condemnation appraisers assessed damages, they were paid into the Court, vesting title in the City to the 1-1/2 acres and attendant easements for the sewer lines to the station.

The petitioners took exception to the award and the City proceeded to construct its lift station and sewers.

Upon the completion of the new sewer system four years later, the lift station began immediately to emit noxious odors and objectionable noises which invaded the petitioners' property not taken in the condemnation. The City admitted at subsequent trial that this was a permanent condition.

The Petitioners filed a suit for damages against the City. A few months thereafter the petitioners dismissed their exceptions to the condemnation award and



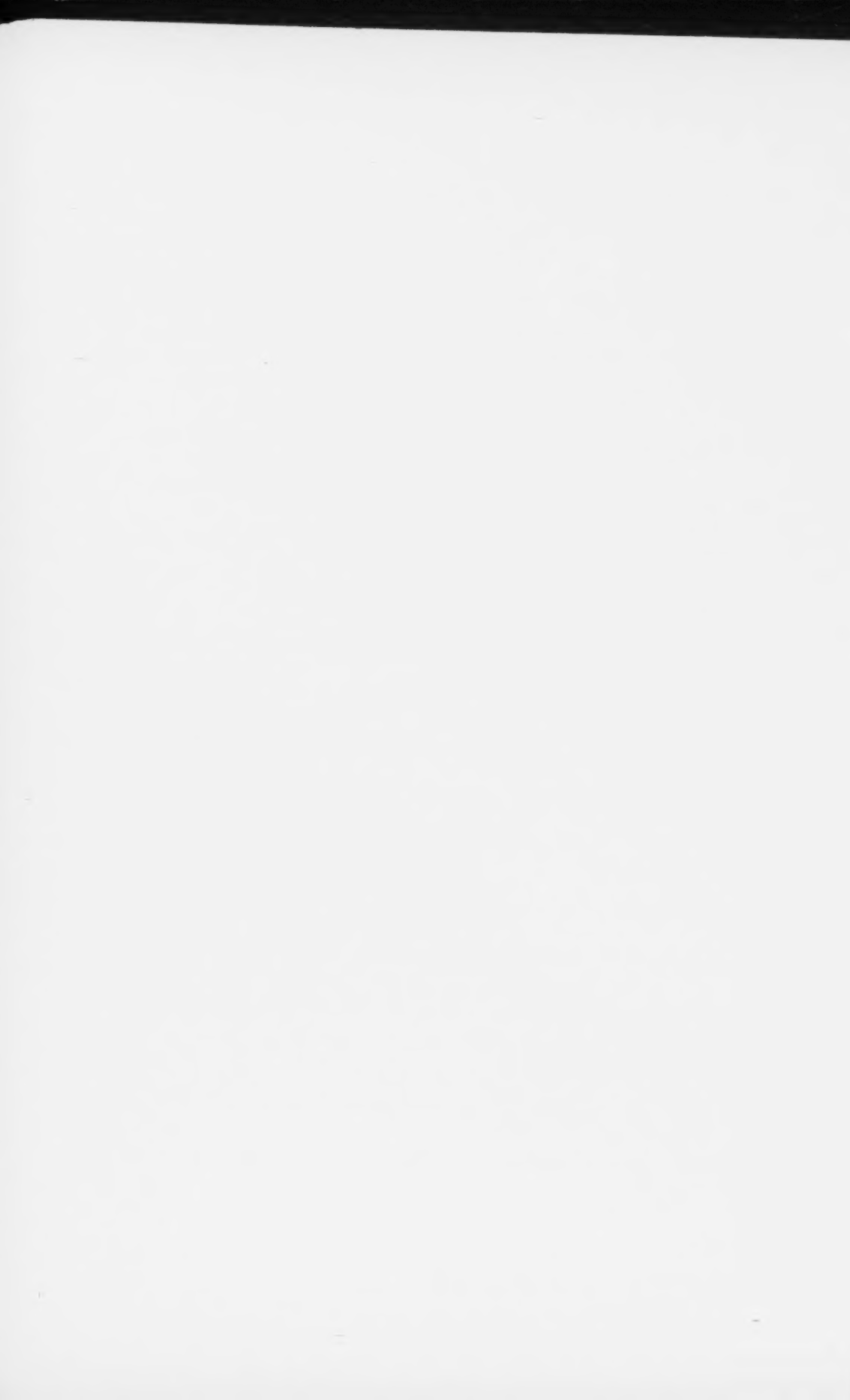
prosecuted their damage suit against the City for the emission of odor and noises.

The damage claim was tried to a jury and petitioners were awarded damages against the City for \$40,875.

The City appealed the damage award to the Missouri Court of Appeals, Southern District. The Court of Appeals affirmed the award.

The City requested the Supreme Court of Missouri to transfer the case so that the law of condemnation might be re-examined. The request for transfer was granted resulting in a reversal by the Supreme Court, the filing by petitioners of a motion for a rehearing its overruling and the subsequent filing of this Petition for Certiorari.

In the trial court the City filed a motion for summary judgment raising the



defense of res judicata which was overruled.(4)

The City raised the matter of res judicata in the Missouri Court of Appeals, Southern district, which was ruled against the appellant.(5)

The first time the question of res judicata was ruled against the petitioners was in the opinion of the Supreme Court of Missouri.(6)

The petitioners immediately raised the constitutional question here presented by filing their motion for a re-hearing which stated in part:

"A municipality has Constitutional and statutory power to condemn for non-tortious, lawful purposes only. When such power of condemnation is exercised, it

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(4) Appendix, Page A-21.

(5) Appendix, Pages A-54, A-79.

(6) Appendix, Page A-93.



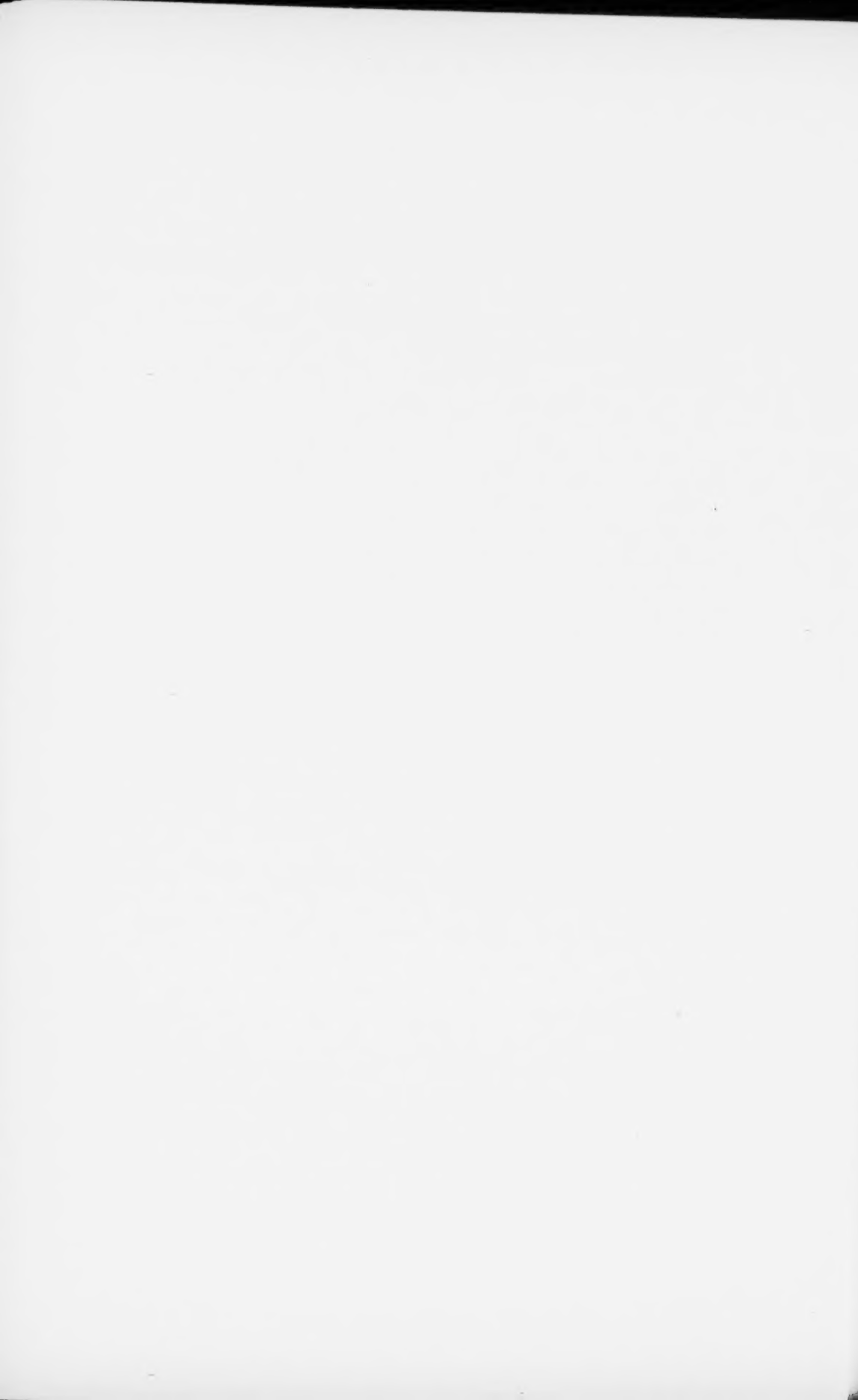


is assumed the condemning authority is acting for lawful purpose even as it exercises its power to take another's property without his consent.

The Fifth Amendment to the United States Constitution, as well as Article I, Section 26 of the Constitution of the State of Missouri, provide that private property shall not be taken for public use without just compensation. Moreover, the Fourteenth Amendment of the United States Constitution precludes any State from depriving 'any person of life, liberty or property, without due process of law.'

The constitutional protections above-cited, historically interpreted, preclude any governmental authority, such as the City of Springfield, Missouri, from committing a legal wrong by virtue of the power to condemn."

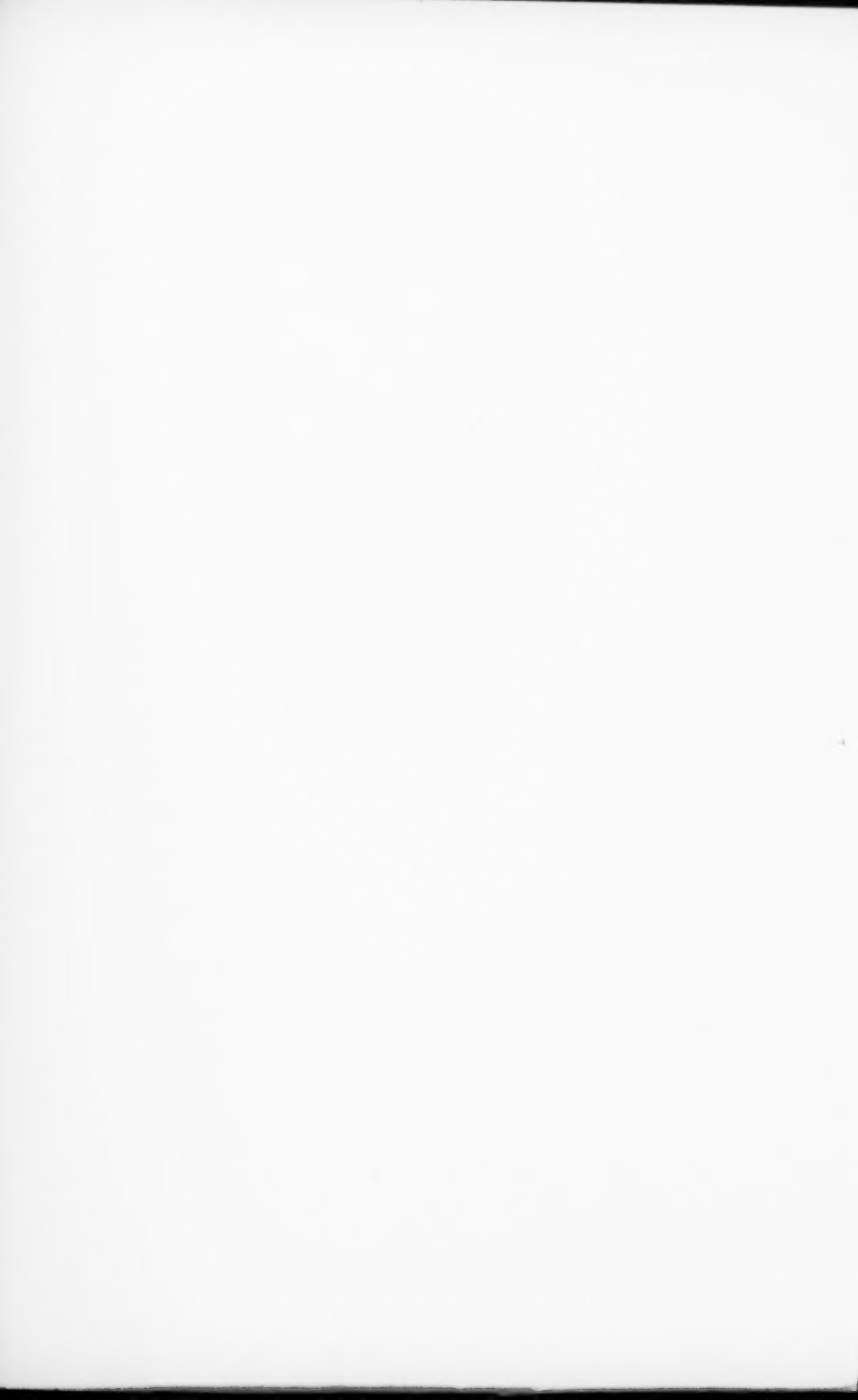
This was the first necessity for the petitioners to raise the constitutional issue.



## ARGUMENT

The power to condemn, granted as a matter of right to the sovereign is limited by Amendment V of the Constitution by saying that just compensation must be paid if there is a public taking. This Amendment is followed by Article 1, Section 26 of the Constitution of Missouri, 1945, which provides for just compensation for a public taking.

The Fifth Amendment to the Constitution of the United States, which enjoins the taking of property for public use without just compensation is applicable to the states through the Fourteenth Amendment, Penn Central Transportation Co. vs. New York, 57 L. Ed. 637.



The City of Springfield was within its rights when it condemned 1-1/2 acres of petitioners' land to build a sewer lift station. The damages where fixed on the day the commissioners' award was filed.

The question is, did the City condemn and pay for the right to emit odors and noises on the balance of petitioners' property four years after the actual condemnation. If they did condemn it and pay for it at that time, then they have not violated petitioners' constitutional rights and this Court owes them no redress.

The only way it could be said that the City condemned it and paid just compensation is to find that petitioners could reasonably have anticipated the actual events that transpired four years later.



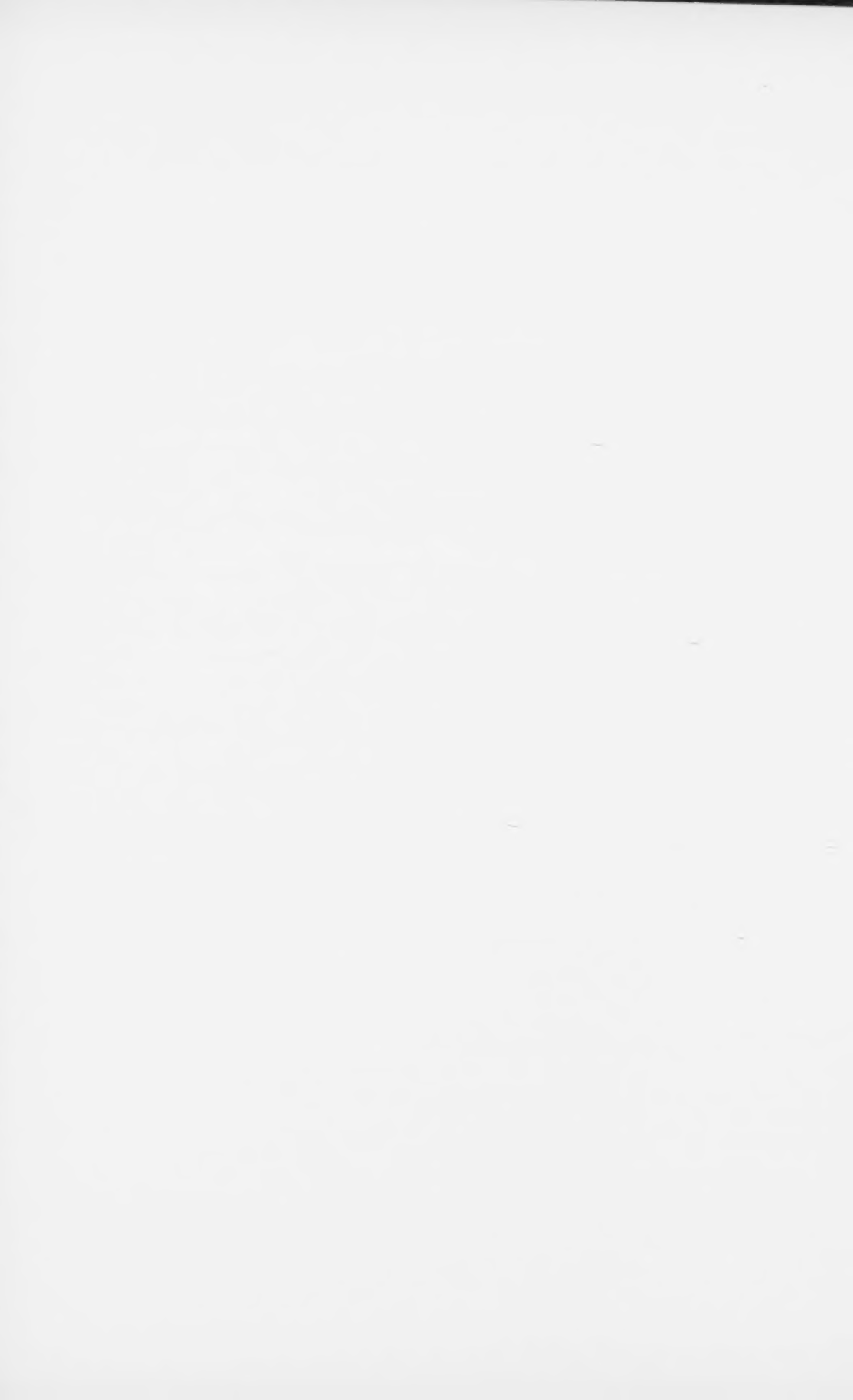
This case should be heard by this Court for two reasons:

First, the Supreme Court of Missouri decided without any evidence to support the proposition, since none was offered, that petitioners ought to have reasonably anticipated the smell and noise. As pointed out in the Missouri Court of Appeals decision<sup>(7)</sup>, there was no submission of the res judicata issue to the jury. So the Supreme Court of Missouri decided this issue in some fashion on its own. Petitioners were deprived of the due process of the law and their rights under the Fifth Amendment and this Court should hear the case on its merits.

A mere tortious act by the City on lands not taken was held by the Missouri

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<sup>(7)</sup> Appendix, Page A-69, A-70.





Supreme Court to be a taking in the condemnation action. This did not amount to a taking. Florida East Coast Property vs. Metropolitan Dade County, 572 F. 2d 1108.

Second, and more important, the Opinion of the Supreme Court of Missouri says to the people of the State of Missouri and as a precedent to the nation that a citizen must, when his property is condemned, set up all things in the condemnation action which some future judge might say he could reasonably have anticipated, or suffer the consequences.

The power of eminent domain is necessary and the Federal Government and the States have taken steps to see that is fairly done and to protect the citizen against extension of the power.

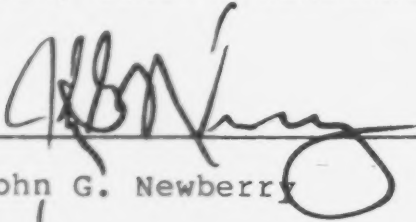


The holding of the Supreme Court of Missouri extends the burden placed on the citizen to anticipate what the condemning authority will do years in the future to such an extent that it deprives him of constitutional rights. This court should hear this case on its merits.

Respectfully submitted,

SCHROFF, GLASS & NEWBERRY, P.C.

By

A handwritten signature in dark ink, appearing to read 'John G. Newberry', is written over a horizontal line. The signature is stylized with a large, looped 'J' and 'N'.

John G. Newberry

Missouri Bar No. 27300

Attorney of Record for

Petitioners